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In the Supreme Court of the United States

OUR CHILDREN'S EARTH FOUNDATION AND ECOLOGICAL RIGHTS FOUNDATION, PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Environmental Protection Agency had a nondiscretionary duty, enforceable in a citizen suit under 33 U.S.C. 1365(a)(2), to consider technology-based factors when reviewing its effluent limitation guidelines for possible revision under Sections 301(d) and 304(b) of the Clean Water Act, 33 U.S.C. 1311(d), 1314(b).

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OPINIONS BELOW

The opinion of the court of appeals on rehearing (Pet. App. 1a-23a) is reported at 527 F.3d 842. An earlier, withdrawn opinion of the court of appeals (Pet. App. 24a-58a) is reported at 506 F.3d 781. The opinion of the district court (Pet. App. 59a-73a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 2008. The petition for a writ of certiorari was filed on August 21, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 505 of the Clean Water Act (CWA) allows any citizen to bring a civil action against the Administrator of the United States Environmental Protection Agency (EPA) "where there is alleged a failure of the Administrator to perform any act or duty under [the CWA] which is not discretionary with the Administrator." 33 U.S.C. 1365(a)(2). As with similar statutory provisions, in order to be nondiscretionary and thus enforceable via the citizen-suit provision, a duty must be a "clear-cut" obligation or a "specific, unequivocal command."[1] See *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004) ("The mandamus remedy [after which Congress modeled 5 U.S.C. 706(1)] was normally limited to enforcement of 'a specific, unequivocal command.'"); *Sierra Club* v. *Thomas*, 828 F.2d 783, 791 (D.C. Cir. 1987) (requiring a nondiscretionary duty to be "clear-cut"); *Mountain States Legal Found.* v. *Costle*, 630 F.2d 754, 766 (10th Cir. 1980) ("Congress thus restricted citizens' suits to actions seeking to enforce specific non-discretionary clear-cut requirements of the Clean Air Act."), cert. denied, 450 U.S. 1050 (1981). See also *Maine* v. *Thomas*, 874 F.2d 883, 888 (1st Cir. 1989); *City of Seabrook* v. *Costle*, 659 F.2d 1371, 1374 (5th Cir. 1981); *Sierra Club* v. *Train*, 557 F.2d 485, 488 (5th Cir. 1977); *NRDC* v. *Train*, 510 F.2d 692, 699-700 (D.C. Cir.

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[1] Because Congress modeled the CWA's citizen-suit provision after a provision in the Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, see *Gwaltney of Smithfield* v. *Chesapeake Bay Found.*, 484 U.S. 49, 62 (1987); *NRDC* v. *Train*, 510 F.2d 692, 699 (D.C. Cir. 1975), cases interpreting that statute are instructive. So are cases interpreting an analogous provision of the Administrative Procedure Act (APA), 5 U.S.C. 706(1), which allows a citizen to maintain an action to compel agency action unlawfully withheld or unreasonably delayed.

1975). Moreover, a citizen suit may challenge only an agency's failure to perform a nondiscretionary duty, not the method by which the duty is performed. See *Southern Utah Wilderness Alliance*, 542 U.S. at 64-65; *Maine*, 874 F.2d at 888; *Farmers Union Cent. Exch., Inc.* v. *Thomas*, 881 F.2d 757, 760-761 (9th Cir. 1989); *City of Las Vegas* v. *Clark County*, 755 F.2d 697, 704 (9th Cir. 1985); *Scott* v. *City of Hammond*, 741 F.2d 992, 995 (7th Cir. 1984); *Pennsylvania Dep't of Envtl. Res.* v. *EPA*, 618 F.2d 991, 995-996 (3d Cir. 1980); *Sun Enters., Ltd.* v. *Train*, 532 F.2d 280, 286-288 (2d Cir. 1976); *Oljato Chapter of Navajo Tribe* v. *Train*, 515 F.2d 654, 664-665 (D.C. Cir. 1975).

2. As relevant here, petitioners' complaint in the United States District Court for the Northern District of California alleged that in 2003 and 2004, EPA failed to satisfy its purportedly nondiscretionary duties under Sections 301(d) and 304(b) of the CWA to consider technology-based factors when reviewing its effluent limitation guidelines.

Section 301 of the CWA addresses EPA's review of effluent limitations. It states in relevant part:

> Any effluent limitation * * * shall be *reviewed* at least every five years *and, if appropriate, revised* pursuant to the procedure established under [paragraph (b)(2)].

33 U.S.C. 1311(d) (emphases added). The cross-referenced provision requires point sources of pollutants that are discharged into navigable waters to achieve effluent limitations that reflect the application of the best available technology that is economically achievable or the best conventional pollutant-control technology. 33 U.S.C. 1311(b)(2).

Section 304(b) of the CWA governs EPA's guidelines for effluent limitations and begins as follows:

> For the purpose of adopting or revising effluent limitations under this chapter the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of October 18, 1972, regulations, providing guidelines for effluent limitations, and, at least annually thereafter, *revise, if appropriate,* such regulations.

33 U.S.C. 1314(b) (emphasis added). The rest of Section 304(b) makes clear that the initial adoption and later revisions of effluent limitation guidelines must be based on factors specified in Section 304(b). 33 U.S.C. 1314(b)(1)(B), (2)(B), and (4)(B). Although Section 304(b) specifies the factors that EPA must consider when it actually *adopts* or *revises* effluent limitation guidelines, neither Section 304(b) nor Section 301(d) specifies the factors EPA is to consider when it conducts its reviews of existing guidelines to identify appropriate candidates for revision.

Pursuant to Sections 301 and 304, EPA reviewed its effluent limitation guidelines in 2003 and 2004.[2] Pet. App. 72a. The agency prioritized its reviews according to the quantity of discharges weighted by the hazard they posed to the environment. Petitioners alleged, however, that EPA's review was deficient because the

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[2] Since the 1970s, EPA has implemented Sections 301 and 304 through the promulgation of consolidated "effluent limitation guidelines," rather than by establishing technology-based categorical effluent limitations independently of its effluent guidelines regulations. Pet. App. 14a; see *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 124 (1977).

CWA requires the prioritization to take account of technology-based factors that EPA allegedly failed to consider. *Ibid.* Petitioners further contended that EPA's failure to consider those factors constituted the failure to perform a nondiscretionary duty. See *id.* at 71a.

3. EPA moved to dismiss the complaint for lack of jurisdiction. The government contended that petitioners' claims amounted to an impermissible challenge to the substance of EPA's review (as opposed to a challenge to an alleged failure to conduct a review) and that such a challenge could not be addressed through a citizen suit, which must seek to enforce a nondiscretionary duty. 33 U.S.C. 1365(a)(2).

The district court entered judgment in favor of EPA, granting in part and denying in part the motion for judgment on the pleadings, and granting summary judgment as to the remaining issues. Pet. App. 59a-73a. The district court found that its jurisdiction was "limited to a review of the discharge of the EPA's statutory duties and [did] not reach questions that would amount to a substantive review of the 2004 [Effluent Guidelines Plan]." *Id.* at 73a. The court analyzed whether EPA, in conducting the annual reviews of all existing effluent limitation guidelines in 2003 and 2004, had met its nondiscretionary duties under Sections 301(d) and 304(b), or whether, as petitioners asserted, EPA could discharge its duties only by conducting those reviews in accordance with certain technology-based factors. The district court held that the CWA does not mandate a technology-based review or any other form of review, but rather accords the agency broad discretion to determine how to conduct its reviews. *Id.* at 69a-70a. The court concluded that, by conducting the required annual reviews in 2003 and 2004, EPA had discharged any non-

discretionary duties under Sections 301(d) and 304(b). *Id.* at 70a-71a.

4. In an opinion that has since been withdrawn, a divided panel of the court of appeals initially reversed and remanded. Pet. App. 24a-56a. The court concluded that "[t]he district court had jurisdiction under [Section] 505(a)(2) to determine whether EPA discharged its non-discretionary duties under the CWA." *Id.* at 32a. The court employed the framework from *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984) (*Chevron*), to determine whether EPA had a nondiscretionary duty under Sections 301(d) and 304(b) to consider specific technology-based factors when reviewing its effluent limitation guidelines for potential revision. Pet. App. 32a-34, 42a-43a. Under the first step of the *Chevron* analysis, the court concluded that the statute's "plain language" clearly "mandates a technology-based approach as a non-discretionary matter" in the *adoption* and *revision* of effluent limitations. *Id.* at 42a. But it could not reach the same result under *Chevron* step one with regard to *reviewing* the limitations and guidelines. Although it concluded that "the overall structure of the [CWA] strongly counsels that any review to determine whether revision is appropriate must contemplate" technology-based factors, the court recognized that "the statute does not expressly and unequivocally state as much." *Id.* at 43a. The court therefore proceeded to analyze the CWA's structure and legislative history under *Chevron* step two, concluding that it would be "unreasonable" for EPA to "totally ignore technology as part of its annual review." *Ibid.* The court concluded that, "[t]o the extent the EPA has completely abandoned a technology-based review in favor of a hazard-based review, the Agency has breached its mandatory duties," and the

court remanded for a determination of whether EPA had in fact considered technology. *Id.* at 51a.

Judge Wallace dissented in part. Pet. App. 56a-58a. He would have held that the CWA does not clearly mandate consideration of specific technology-based factors during review of the effluent limitation guidelines. *Id.* at 58a. He concluded that, because the CWA does not unambiguously require EPA to consider certain technology-based factors in its review of the effluent limitation guidelines, petitioners had failed to identify "a clear-cut, mandatory duty on the part of the EPA" that could be enforced through a citizen suit. *Ibid.*

5. The federal respondents filed a petition for panel rehearing or rehearing en banc. The court of appeals granted panel rehearing and withdrew its earlier opinion. Pet. App. 3a. In its revised opinion (*id.* at 1a-23a), the court held, in relevant part, that "[n]othing in the CWA specifically obligates the EPA to *review* the effluent guidelines and limitations using a technology-based approach. At most, the statutory provisions and legislative history are ambiguous." *Id.* at 19a. The court further explained that there was no need to invoke *Chevron* analysis in this context because "we are not trying to determine whether we should defer to the EPA's interpretation of the statute, but are trying to determine whether, objectively, the statute creates a mandatory duty." *Id.* at 20a; see also *ibid.* ("the statute falls short of imposing a mandatory duty and thus the review criteria are not properly before the court under [Section] 505(a)(2)").

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioners contend (Pet. 2, 14-16, 18-20, 27) that the court of appeals created an intra-circuit conflict or split by withdrawing its initial opinion *in this case* and issuing a revised opinion. Petitioners even imply (Pet. 24) that the court's revised opinion is inconsistent with portions of the initial opinion that were purportedly "left intact" because the revised opinion did not expressly "reverse or criticize" them. But differences between an opinion that has been "withdrawn" and "replaced" in its entirety (Pet. App. 3a) and a revised opinion from the same panel do not create an intra-circuit split. And, even if they did, an intra-circuit conflict would not warrant review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties.").[3]

2. Petitioners contend that their challenge is cognizable under the CWA's citizen-suit provision because "EPA's nondiscretionary duty includes considering technology-based factors in reviewing" its effluent limitation guidelines. Pet. 25 (capitalization modified). Petitioners do not and could not assert, however, that there is any

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[3] For the same reason, any conflict between the Ninth Circuit's decisions in this case and in *San Francisco Baykeeper* v. *Whitman*, 297 F.3d 877 (9th Cir. 2002), would provide no basis for this Court's review. In any event, *San Francisco Baykeeper* did not directly consider whether analysis under *Chevron*'s second step is appropriate in cases involving nondiscretionary duties, and it predates this Court's decision in *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 62-65 (2004), on which the court of appeals relied in this case, Pet. App. 20a.

circuit split on that question (*i.e.*, on the actual holding of the court of appeals on the merits of this case). Instead, petitioners focus on the court of appeals' methodology, claiming (Pet. 18) that the court failed to employ "traditional tools of statutory construction and/ or the *Chevron* second step framework" in determining the extent of EPA's nondiscretionary duties. The court of appeals' mode of analysis was appropriate and created no conflict with another court of appeals.

Petitioners repeatedly assert (Pet. 20-23) that the decision below conflicts with cases from other circuits because the Ninth Circuit purportedly rejected the use of "extrinsic aids" such as legislative history when construing the statute. In fact, the court of appeals plainly took legislative history into account. It specifically concluded that "the statutory provisions *and legislative history* are ambiguous." Pet. App. 19a (emphasis added); see also *id.* at 20a (referring to "an amalgamation of disputed statutory provisions and legislative history").

Petitioners also attack (Pet. 18-22) the court of appeals' statement that the *Chevron* framework is inapplicable when determining whether the CWA imposes a clear-cut, nondiscretionary duty on EPA. While the analysis in the first step of *Chevron* is similar to that necessary to determine whether a statute imposes a nondiscretionary duty on an agency, the second step is generally irrelevant to such a determination. A nondiscretionary duty exists only where the statute imposes "clear-cut" obligations or "specific, unequivocal commands"—in other words, where the statute is unambiguous. See pp. 2-3, *supra*. When a court has concluded that a statute is ambiguous for purposes of *Chevron* step one, its analysis necessarily implies that no nondis-

cretionary duty exists. *Chevron*'s second step—which requires courts to defer to an agency's reasonable interpretation of an *ambiguous* statute—is therefore inapposite in this setting. As the court of appeals concluded, in a nondiscretionary-duty lawsuit, the question is not, as in the second step of *Chevron* analysis, whether an agency reasonably believes it has a nondiscretionary duty to do something, but whether the statute creates an unambiguous nondiscretionary duty. Pet. App. 20a.

The out-of-circuit cases that petitioners identify (Pet. 20-21) do not contradict that conclusion.[4] None of them held that an agency acted unreasonably in construing an *ambiguous* statute as not imposing a nondiscretionary duty. See *Monongahela Power Co.* v. *Reilly*, 980 F.2d 272, 279 (4th Cir. 1992) (finding agency's interpretation is "reasonable"; "[w]here, as here, * * * Congress' silence gives rise to ambiguity as to its wishes, the administering agency is not required to adopt any particular interpretation from among the plausible alternatives"); *Environmental Defense Fund* v. *Thomas*, 870 F.2d 892, 900 (2d. Cir. 1989) ("Congress's intent that the Administrator make some decision is clear.") (emphasis omitted); *Dubois* v. *Thomas*, 820 F.2d 943, 951 (8th Cir. 1987) ("In light of the language of the statute and its legislative history, it is clear that the Administrator's interpretation is permissible.").[5] The Fourth Circuit did

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[4] Petitioners cite (Pet. 21) several decisions of federal district courts as contributing to the alleged conflict, but such decisions do not create the sort of conflict that justifies a writ of certiorari. See Sup. Ct. R. 10(a).

[5] Petitioners also cite (Pet. 21-22) *NRDC* v. *Train*, 510 F.2d 692 (D.C. Cir. 1975), for the proposition that an agency's discretion can be "rein[ed] in" even when a statute is ambiguous. As the D.C. Circuit has since explained, however, *Train* did not even resolve the question of

state in dicta in *Monongahela Power Co.* that, consistent with *Chevron*, "the Administrator" could "[p]resumably" interpret "an ambiguous statute so as to impose a non-discretionary duty" on EPA. 980 F.2d at 278 n.6. But that is not the situation here, because EPA has never construed the CWA to impose a nondiscretionary duty on the agency to consider technology-based factors in reviewing its guidelines.[6] Petitioners would effectively turn *Chevron* deference on its head by seeking a determination that *their* interpretation (rather than the agency's) is a reasonable one that deserves judicial deference.

3. Petitioners criticize (Pet. 26-27) the court of appeals for failing to address EPA's argument that the reviews in question are not sufficiently "discrete" actions to be reviewable. See *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 64, 66, 72 (2004). Petitioners, however, have not alleged that EPA failed to perform its annual reviews at the times required by law. Nor do petitioners challenge EPA's decision not to re-

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whether EPA's duty to publish guidelines by December 31, 1974, was "a nondiscretionary duty covered by the 'citizen suits' provision for district court review." *Sierra Club* v. *Thomas*, 828 F.2d 783, 789 (1987). In *Sierra Club*, the D.C. Circuit held that, even though "there may be isolated occasions when, upon extensive analysis, one can conclude that an inferrable deadline imposes a mandatory duty of timeliness," there is no district court jurisdiction over a citizen suit under Section 304 of the Clean Air Act, 42 U.S.C. 7604, unless the deadline is "readily-ascertainable from the statute" itself. *Sierra Club*, 828 F.2d at 791-792.

[6] The court of appeals referred to "EPA's own earlier interpretation" of Sections 301 and 304. Pet. App. 20a (citing *Preliminary Effluent Guidelines Plan for 2004-2005*, 68 Fed. Reg. 75,520 (2003)). But the statements it apparently had in mind simply show that EPA had in fact planned, *in its discretion*, to consider technology-based factors in its upcoming annual reviews.

vise a specific effluent limitation guideline, or to take any other *discrete* action. Instead, petitioners challenge the manner in which EPA performed its review—a kind of challenge that is not cognizable in a nondiscretionary-duty lawsuit. See p. 3, *supra*. Thus, although the court of appeals did not reach this issue, the absence of a discrete agency action in this case would provide an alternative ground for affirmance, and thus furnishes an additional reason to deny the petition for a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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